In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 1371

SIGMUND GOLDBLATT, PETITIONER

v.

UNITED STATES OF AMERICA

No. 1372

ROBERT C. COTTEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

No. 1373

NATHAN WECHSLER, PETITIONER

v.

UNITED STATES OF AMERICA

No. 2077 Misc.

A. CLAIBORNE LEIGH, PETITIONER

v.

UNITED STATES OF AMERICA

352-481—69

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners seek certiorari to review the denial by the court of appeals of their second petition for rehearing, filed after this Court had denied certiorari and rehearing.

1. After a jury trial in the United States District Court for the Eastern District of Virginia, petitioners and others were convicted of conspiring to violate and violating 18 U.S.C. 1952(a)(3) by using the facilities of interstate commerce in furtherance of a scheme in which certain members of the Fairfax County Board of Supervisors were bribed to render a favorable decision on an application for rezoning of land in Fairfax County. The court of appeals, one judge dissenting, affirmed the convictions, 392 F. 2d 344, and certiorari was denied, 392 U.S. 932, rehearing denied, 393 U.S. 902. The evidence is set forth in detail in that opinion of the court of appeals and in the government's Brief in Opposition to the prior petition for a writ of certiorari, No. 1377, O.T., 1967.

The pertinent feature of the proof for present purposes is that, a few days prior to enactment of 18 U.S.C. 1952, a check was delivered as payment of the bribes.[1] The essential object of the conspiracy—the

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[1] The subsequent check to petitioner Cotten in payment of his

securing of the rezoning—did not, however, occur until approximately ten months later when the rezoning application was finally granted. The principal contention on appeal, in the prior petition for certiorari and here now, was that, since the minimum elements necessary to support a bribery prosecution under state law had occurred (and the offense of bribery under Virginia law was in that sense complete) before enactment of the federal statute,[2] the statute as applied to them constituted an *ex post facto* law.

Petitioners' argument in the earlier petition was to some extent based on the position taken by the government with respect to 18 U.S.C. 1952 in its jurisdictional statement in *United States* v. *Nardello* (No. 1277, O.T., 1967). Petitioners contended, and the gov-

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share, however, cleared the banks, through the use of interstate facilities, after passage of 18 U.S.C. 1952. See 392 F. 2d at 347.

[2] The statute (18 U.S.C. 1952) provides in pertinent part:

> (a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—
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> * * * * *
>
> (3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
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> and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
>
> (b) As used in this section "unlawful activity" means * * * (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

ernment disputed in its Brief in Opposition, that the positions advanced by the United States in the two cases were inconsistent. On the same day the Court noted probable jurisdiction in *Nardello,* 392 U.S. 923, it denied petitioners' petition for certiorari, 392 U.S. 932. A petition for rehearing of the denial of certiorari, again claiming dependence on *Nardello,* was thereafter denied. 393 U.S. 902.

2. In its subsequent decision in *Nardello,* 393 U.S. 286, the Court sustained the government's position that Congress used the term "extortion" in 18 U.S.C. 1952 in a generic sense, so as to embrace all extortionate conduct punishable by state law, whether or not the particular state statute covering the conduct was denominated under the heading of "Extortion". Petitioners then sought and received leave to file a second petition for rehearing in the court of appeals.[3] After response by the government, and what it termed "consultation with non-panel members of the court," the original panel of the court of appeals denied the petition for rehearing in a *per curiam* opinion and order, Judge Winter dissenting as he has throughout.

3. In the petition for rehearing below, and in their present separate petitions for writs of certiorari, petitioners have urged that the decision of this Court in *Nardello* undermined the rationale of the prior court of appeals opinion sustaining their convictions. The argument is essentially a reiteration of their conten-

[3] Before seeking certiorari in the first instance, petitioners had filed a petition for rehearing en banc in the court of appeals, which denied it 5–1.

tions in this regard in the prior petition for a writ of certiorari.

Nardello is in no way inconsistent with the decision sustaining petitioners' convictions for violating 18 U.S.C. 1952. Petitioners purport to find inconsistency in the recognition by this Court in *Nardello* that the principal purpose of Section 1952 is to assist the states in the enforcement of their laws against bribery and extortion. This objective is reflected by the statutory definition of the terms "bribery" and "extortion" by reference to state law and the consequent withholding of federal penalties for conduct which does not promote or carry on an offense of these types recognized by state law. See *Nardello, supra,* 393 U.S. at 293. Neither the language of the statute nor its interpretation in *Nardello,* however, supports petitioners' argument that the reach of the federal statute is limited to the minimum events whose occurrence each state has determined to be sufficient to permit local prosecution.[4] The wording of Section 1952(a)(3)—prohibiting the use of interstate facilities with intent to "otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of * * * [bribery]"—demonstrates that the focus of the federal enactment is the *entire* enterprise having as its purpose the corruption of state

[4] See 18 U.S.C. 1952(a)(1), prohibiting the use of interstate facilities with intent to "distribute the proceeds of any unlawful activity." Unless the distribution of proceeds constituted an element of the state's laws against bribery or extortion, the conduct prohibited by the federal statute would *necessarily* occur after the completion of the substantive state offense.

officials *in violation of the state's laws against bribery. United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.).

Petitioners do not and can not deny that an essential object of the conspiracy proved here was that petitioner Cotten would enjoy the promised compensation for his vote—an object accomplished through the use of interstate facilities after Section 1952 became effective (see note 1, *supra*), as was the ultimate goal of favorable action on the rezoning application. The broad language used by the statute clearly encompasses such conduct designed to "carry on" the scheme that reaches its climax—but not its denouement—with the corrupt offer.

That performance of the minimum elements of the state offense was not intended to confine the focus and applicability of the federal statute is underscored by the fact that a federal offense may be committed *before* the elements minimally necessary for state prosecution have occurred. The Act prohibits using interstate facilities with intent to "establish" or "promote" an unlawful activity if thereafter the user attempts to perform such an act—whether or not a state bribery offense is completed. Thus, while state law is undoubtedly the touchstone for determining whether the conduct falls within the federal statute, the applicability of this Act does not stand or fall on fixing the time when, for the state's purposes, the crime is complete.

The legislative purpose behind passage of 18 U.S.C. 1952 is well in accord with its application to the facts here. Even though Virginia has determined that peti-

tioners' conduct should be subject to prosecution at the time of the offer of a bribe or its acceptance (see *Ford* v. *Commonwealth*, 177 Va. 889, 15 S.E. 2d 50), this does not mean that the state has no interest in petitioners' subsequent activities designed to effectuate the unlawful scheme. The effect of the bribery continues as long as the transaction has not been completed on both sides, for throughout that period the payment of money will continue to influence official action. The holding of the court below—that a conspiracy to violate Section 1952 may be evidenced by the use of an interstate facility *during the period of the bribery scheme*—permits the federal statute to serve its intended purpose of aiding the enforcement of Virginia's laws by closing the channels of interstate commerce to those who would use them to carry out their plots against certain types of local laws. This construction is not inconsistent with *Nardello;* on the contrary, it is required by the Court's recognition that "[t]he legislative response was to be commensurate with the scope of the problem." 393 U.S. at 292. This conclusion is also in accord with the interpretation given the statute by the only other court which has considered the instant question. *United States* v. *Kubacki*, 237 F. Supp. 638, 642–643 (E.D. Pa.); cf. *McIntosh* v. *United States*, 385 F. 2d 274 (C.A. 8).

It is therefore respectfully submitted that the petitions for writs of certiorari should be denied.

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